SONG BOK YOONG v. HO KIM POUI

[A.C.J. (MacIntyre J.) August 18, 1967]
[Ipoh — Civil Appeal No. 6 of 1967]

Contract — Guarantors — Release of joint guarantor without consent of the other — Common law principle not applicable to contracts in Malay States — Contracts (Malay States) Ordinance, 1950, ss. 45 & 91.

The common law principle that the release of a joint guarantor without the consent of the other would release him from his obligation under the bond is not applicable to contracts in the Malay States. In the Malay States the law relating to contracts is contained in the Contracts (Malay States) Ordinance, 1950 in which some of the provisions are at variance with the principles of the common law.

MAGISTRATE'S CIVIL APPEAL.

M. Sivalingam for the appellant.

Mahinder Singh for the respondent.

Cur. Adv. Vult.

MacIntyre J.: This is an appeal from the decision of the learned president of the sessions court at Ipoh, whereby judgment was entered against the appellant for $2,000 and costs, the claim being in respect of the amount alleged to be due and owing by one Yap Lee, the 1st defendant to the action under the terms of a hire agreement for the due performance of which the appellant was a guarantor.

The agreement in question (P.1A) was entered into on the 1st day of March 1962, between the respondent as the owner of a diesel engine, the aforesaid Yap Lee as hirer and the appellant and one Cheah Yam Lau as guarantors. The agreed rental was $300 per mensem for a period of six months commencing from the date of the agreement with a further stipulation that the hiring would continue for a further period of six months unless the hirer put an end to it by giving notice at least one month before the expiration of the first period of six months. The guarantors jointly guaranteed the due performance and observance by the hirer of the several terms and conditions contained in the agreement.

The agreement was not terminated at the end of six months and continued to be in force for a further period of six months. The appellant was notified of the extension by Yap Lee himself. Eventually, the hiring came to an end on the 28th of February 1963. By then Yap Lee had run into arrears in respect of hire and cost of repair of the engine and the amount outstanding on the 28th of February 1963 was $2,003.65. For the purpose of bringing the action in the sessions court, the claim was reduced to $2,000.

There is no dispute as to the amount of the claim outstanding and Yap Lee as the 1st defendant to the action had submitted to judgment for the full amount. The appellant, who was the 2nd defendant in the action however denied liability on the ground that his liability as guarantor under the said agreement had lapsed at the expiry of the first period of six months and that he was not a party to the renewal of the agreement. In regard to this plea, the learned president held that the appellant's liability as guarantor was not extinguished by virtue of the renewal of the lease for a further period of six months. This finding should have concluded the matter but it is now contended on appeal that since the other guarantor had not been sued, the appellant is released of his liability under the agreement by virtue of the release of the other guarantor from his obligation under the agreement.

Mr. Sivalingam for the appellant contended that there had been a variance of the contract between the respondent and the appellant by the renewal of the contract for a further period of six months without his consent and thereby the appellant was discharged as surety by virtue of the provisions of section 86 of the Contracts (Malay States) Ordinance, 1950. Section 86 can have no application to this case, since there has been no variance of the contract as between the respondent and the hirer. The renewal of the contract was provided for in the terms of the agreement itself.

Counsel relied on English authorities for the proposition that the release of a joint guarantor without the consent of the other would release him from his obligation under the bond. This common law principle is not applicable to contracts in this country. In this country the law relating to contracts is contained in the Contracts (Malay States) Ordinance, 1950 in which some of the provisions are at variance with the principles of the common law — as for instance, section 45 which declares that the release of one joint promisor by the promisee does not discharge the other joint promisor. And more to the point at issue is section 91 which reads:—

> "Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibilities to the other sureties."

I am surprised that no reference was made at the hearing to this section and to its implication. The corresponding section in the Indian Contract Act is section 138. According to *Mulla*, 8th Edition at page 543:—

> "This section is a necessary consequence of the principle laid down in section 44 (see section 45 of our Contracts Ordinance) and must be taken as a deliberate extension of a rule which in the common law is limited to the case of sureties contracting severally and not jointly."

This appeal must therefore fail on both grounds raised in the memorandum of appeal. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Lim Cheng Ean & Co.; Maxwell, Kenion, Cowdy & Jones.*

TAN TECK YAM v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) August 29, 1967]

[Selangor — Criminal Case No. 61 of 1967]

Criminal Law — Obstructing public servant in discharge of his public function — Refusing to leave public servant's office when asked to do so — Whether voluntary obstruction.

Penal Code, ss. 186 and 39 — "Voluntarily" obstructs a public servant — Meaning of.

The appellant was charged with obstructing the chief assistant district officer, Kuala Lumpur, in the discharge of his public function, an offence punishable under section 186 of the Penal Code. He was unrepresented in the court below. He claimed trial and was duly convicted and sentenced to three months' imprisonment.

The appellant had for the last 3½ years been frequenting the district office in order to apply for a piece of land on Mountbatten Road. It was not disputed that he pestered the district officer with his claim about four times a week during that period. The appellant after being in the chief assistant district officer's office for half-an-hour, that officer requested the appellant to leave his room as there were others outside his office who were waiting to see him. He told the appellant that he would have to call the police if he did not leave. The appellant dared him to do so and stood up and banged his file on the table. He then raised his fists and challenged the officer to a fight. He said that he could even call in his wife, and just then the wife rushed in with her hands ready for a fight. Both of them were threatening the said officer and he realised then that he had to call in the police. Subsequently the police arrived and the appellant was apprehended.

Held: (1) for an offence under section 186 of the Penal Code the prosecution has to prove the following: (a) that there was obstructing of a public servant, (b) that the public servant was at that time discharging his public function, and (c) that the person obstructing did so voluntarily. It is clear, therefore, that to obstruct under section 186 is to do an act which makes it more difficult for a public servant to carry out his duties;

(2) the definition of the term "voluntarily" bears resemblance to the definition of "wilfully" current in the English law. "Wilful" in this context means not only "intentional" but also connotes something which is done without lawful excuse.

Cases referred to:—

(1) *Hinchliffe* v. *Sheldon* [1955] 3 All E.R. 406, applied.

(2) *Rice* v. *Connolly* [1966] 2 All E.R. 649 at p. 651, applied.

MAGISTRATE'S CRIMINAL APPEAL.

T. Selvarasan for the appellant.

Zaiton binte Osman (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J. (delivering oral judgment): The appellant was charged with obstructing the chief assistant district officer, Kuala Lumpur, in the discharge of his public function, an offence punishable under section 186 of the Penal Code. He was unrepresented in the court below. He claimed trial and was duly convicted and sentenced to three months' imprisonment.

The facts are sufficiently stated in the learned magistrate's judgment. The appellant had for the last 3½ years been frequenting the district office in order to apply for a piece of land on Mountbatten Road. It is not disputed that he pestered the district officer with his claim about four times a week during that period. I now quote a passage from the learned magistrate's judgment:—

> "After being in the chief assistant district officer's office for half-an-hour, that officer requested the appellant to leave his room as there were others outside his office who were waiting to see him. He told the appellant that he would have to call the police if he did not leave. The appellant dared him to do so and stood up and banged his file on the table. He then raised his fists and challenged the officer to a fight. He said that he could even call in his wife, and just then the wife rushed in with her hands ready for a fight. Both of them were threatening the said officer and he realised then that he had to call in the police".

Subsequently the police arrived and the appellant was apprehended. From the record, there is no doubt that the learned magistrate disbelieved the appellant's version.

For an offence under section 186 of the Penal Code the prosecution has to prove the following: (1) that there was obstructing of a public servant, (2) that the public servant was at that time discharging his public function, and (3) that the person obstructing did so voluntarily. It is in my view clear that to obstruct under section 186 of the Penal Code is to do an act which makes it more difficult for a public servant to carry out his duties. I take that definition of "obstruction" from the case of *Hinchliffe* v. *Sheldon*.[1] It is therefore quite clear that the appellant was making it more difficult for the chief assistant district officer to discharge his public function and that the said officer was at that time involved in discharging his public functions. The only remaining element of the alleged offence is whether the obstruction was voluntary. That brings me to section 39 of the Penal Code which defines "voluntarily" as,

> "A person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it".

The definition of the term "voluntarily" bears resemblance to the definition of "wilfully" current in the English law. (See *Raitanlal*, The Law of Crime, 21st Ed. p. 82). In *Rice* v. *Connolly* [2] Lord Parker, C.J. said,

> " 'Wilful' in this context in my judgment means not